

Honorable James L. Robart

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA,) NO. CR15-109JLR
Plaintiff,)
v.) MEMORANDUM IN SUPPORT
RAYMOND FRYBERG, JR.,) OF MOTION IN LIMINE TO LIMIT
Defendant.) TRIBAL JUDGES' TESTIMONY

INTRODUCTION

“Calling a judge to give testimony in any proceeding is a very delicate matter.”

United States v. Roth, 332 F. Supp. 2d 565, 568 (S.D.N.Y. 2004) aff'd sub nom. United States v. St. John, 267 F. App'x 17 (2d Cir. 2008). The United States has served trial subpoenas on two tribal judges with the Northwest Intertribal Court System, Judge Randy Steckel and Judge Randy Doucet. After discussing the scope of their anticipated testimony with the United States Attorney's Office, Judges Steckel and Doucet move this

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The logo for Burifunston Mumford PLLC. It features the firm's name in a large, bold, serif font. Below the name, the words "attorneys at law" are written in a smaller, sans-serif font. The entire logo is set against a dark background.

1 Court to limit their testimony to two topics: (1) authenticating relevant Tulalip Tribal Court
2 orders and (2) describing the standard procedures for deciding protection orders in Tribal
3 Court. The Judges should offer limited factual testimony.

4 Under no circumstances should the parties question the Judges on their mental
5 processes in reaching their decisions or the underlying grounds for the orders.
6

7 **I. Statement of Facts**

8 This matter is currently set for trial on September 21, 2015. The United States
9 Attorney's Office served trial subpoenas on Judge Randy Steckel and Judge Randy
10 Doucet. Both Judges work for the Northwest Intertribal Courts System and both entered
11 orders regarding defendant Raymond Fryberg, Jr., in Tulalip Tribal Court.

12 Judge Steckel entered the initial protective order against defendant in 2002. Judge
13 Doucet quashed an arrest warrant for defendant and entered judgment and sentence
14 against defendant in 2012 for violating the 2002 order. The Tulalip Tribe, its court system,
15 and Judges Steckel and Doucet are not parties to this lawsuit.

16 On September 15, 2015, counsel for Judges Steckel and Doucet met with the
17 Assistant United States Attorneys in this case in a good faith effort to comply with the trial
18 subpoenas. The accompanying proposed Order in Limine is the result of those
19 negotiations.

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ARGUMENT

II. Judges Should Not Be Witnesses

The Code of Conduct for United States Judges, Canon 2(B) states, “a judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.” This includes serving as a witness in any proceeding.

Judges Steckel and Doucet do not appear in this matter voluntarily, and will testify only under subpoena. They object to being called as witnesses.

A party has no right to compel a judge to testify why he or she granted an order.

[T]he overwhelming authority from the federal courts in this country, including the United States Supreme Court, makes it clear that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or the reasons that motivated him in the performance of his official duties. See e.g. United States v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); Fayerweather v. Ritch, 195 U.S. 276, 306-07, 25 S.Ct. 58, 49 L.Ed. 193 (1904); Grant v. Shalala, 989 F.2d 1332, 1344-45 (3d Cir.1993); Robinson v. Commissioner of Internal Revenue, 70 F.3d 34, 38 (5th Cir.1995). “Judges are under no obligation to divulge the reasons that motivated them in their official acts; the mental processes employed in formulating the decision may not be probed.” United States v. Cross, 516 F.Supp. 700, 707 (M.D.Ga.1981), aff’d, 742 F.2d 1279 (11th Cir.1984). In Morgan, the Supreme Court stated that allowing an examination of a judge’s mental processes would be “destructive of judicial responsibility” and such scrutiny cannot be permitted. Morgan, 313 U.S. at 422, 61 S.Ct. 999.

United States v. Roth, 332 F.Supp.2d at 567. Neither the United States nor defendant Fryberg may question Judges Steckel and Doucet on the grounds for their decisions or

1 why the ruled a particular way. Any legal questions to the Judges would be improper and
2 objectionable.

3 Despite these restrictions, under extremely limited circumstances, this Court may
4 compel the Judges to present factual testimony.

5 Judge Gordon possessed factual knowledge that was highly pertinent to the
6 jury's task, and he was the only possible source of testimony on that
7 knowledge. To say that the district court abused its discretion by admitting
8 the testimony in these circumstances would be tantamount to announcing
9 a rule that a judge may never testify in criminal proceedings, no matter how
10 important his testimony or how well the delicacy of his being called is
handled. The interests of justice would be served poorly indeed by such a
rule, and we decline its adoption as the law of this circuit. So far as we are
aware, no court has even come close to adopting such a position.

11 United States v. Frankenthal, 582 F.2d 1102, 1108 (7th Cir. 1978).

12 Citing Frankenthal, the Ross Court articulated a three-part test.

13 [A] judge may only be required to testify if he (1) possesses factual
14 knowledge, (2) that knowledge is highly pertinent to the jury's task, and (3)
15 is the only possible source of testimony on the relevant factual information.

16 Ross, 332 F.Supp.2d at 568. Judges Steckel and Doucet request the Court to adopt the
17 Ross standard in this case, and to compel their testimony only if it meets this test.
18 Because they do not know the United States' case, its witnesses, or its evidence, Judges
19 Steckel and Doucet express no opinion on whether they alone possess relevant factual
20 information. They will respond to the trial subpoenas and follow the orders of this Court.

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CONCLUSION

Judges Randy Steckel and Randy Doucet respectfully move this Court to limit their testimony to authenticating relevant Tulalip Tribal Court documents and to the standard process for deciding protection orders in that Court. If other witnesses provide that information at trial, there is no need for their testimony. On the other hand, if no witness other than the Judges can testify to that, the Judges recognize this Court's authority to compel their testimony.

Respectfully submitted this 16th day of September, 2015,

BURI FUNSTON MUMFORD, PLLC

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